

**REMARKS**

The February 2, 2009 Final Office Action was based on pending Claims 33–40, 42–45, 52–54, 56–62, 65 and 67–70. By this Response, Applicant is amending Claims 33–40, 43, 52, 58 and 59 without prejudice or disclaimer. Claims 42, 44, 45, 53, 54, 56, 57, 60–62, 65 and 67–70 remain as previously presented.

Thus, after entry of the foregoing amendments, Claims 33–40, 42–45, 52–54, 56–62, 65 and 67–70 are pending and presented for further consideration. In view of the foregoing amendments and the remarks set forth below, Applicant respectfully submits that Claims 33–40, 42–45, 52–54, 56–62, 65 and 67–70 are in condition for allowance.

**CLAIM REJECTIONS UNDER 35 U.S.C. § 103(a)**

The Final Office Action rejects the pending claims of the present application under 35 U.S.C. § 103(a). In particular, based on the comments in the Final Office Action, Claims 33–36, 38 and 67–70 appear to be rejected as being unpatentable over U.S. Patent No. 5,865,680 to Briggs ("Briggs") in view of U.S. Patent No. 6,426,741 to Goldsmith ("Goldsmith") and U.S. Patent No. 6,371,375 to Ackley et al. ("Ackley"). In addition, Claims 37, 39, 40, 42–45, 52–54, 56–62 and 65 appear to be rejected as being unpatentable over Briggs in view of Goldsmith, Ackley and U.S. Patent No. 5,114,155 to Tillery et al. ("Tillery").

Applicant respectfully traverses these rejections, the characterization of the pending claims and the cited references, and each and every implicit and/or explicit reliance on Official Notice. Moreover, in view of the foregoing amendments and for at least the reasons set forth below, Applicant respectfully requests reconsideration of the aforementioned claims.

**Independent Claim 33**

Focusing on amended independent Claim 33, in one embodiment of Applicant's invention an interactive gaming system is disclosed for entertaining one or more play participants. The system includes a play structure and one or more play modules disposed within the play structure. Each of the play modules comprises multiple play

elements with interactive challenge(s) to be played by play participant(s) as part of an interactive game.

The system also includes a toy wand operable by at least one play participant by waving, shaking, stroking and/or tapping the toy wand in a predetermined manner to transmit a first signal to wirelessly actuate at least one of the multiple play elements. The toy wand further includes a memory configured to (i) store identification information for uniquely identifying the at least one play participant and (ii) store progress information of the play participant in the interactive game. The toy wand is further configured to wirelessly transmit at least one of the identification information and the progress information to at least one of the play elements during participation by the play participant in the interactive challenge(s), and the play element is configured to adjust the one or more interactive challenges using at least said progress information.

As discussed in more detail below, neither Briggs, nor Goldsmith, nor Ackley, nor a combination thereof, teaches or suggests the interactive gaming system of amended independent Claim 33. For instance, the cited references do not teach or suggest a toy wand operable by a play participant by waving, shaking, stroking and/or tapping the toy wand to wirelessly actuate a play element in an interactive game. Moreover, the cited references do not teach or suggest such a toy wand further having a memory that stores both (i) identification information associated with the play participant and (ii) progress information of the play participant in the interactive game. The cited references also do not teach or suggest a play element that is configured to adjust one or more interactive challenges using at least the progress information.

#### **Briggs**

Briggs is directed to "a kinetic interactive play structure for entertaining and educating children and adults" (Abstract). For instance, the play structure can include a number of kinetic play elements (e.g., wheels, pulleys, gears, windmills) that can be activated to transfer kinetic energy from one to another in a chain of triggering events to complete a desired result or effect (see, e.g., col. 2, lines 40–55 and 63–66).

The Final Office Action cites Briggs, in particular, for teaching a play structure having multiple play modules and elements providing interactive challenges to

participants in an interactive game. However, on pages 3 and 4, the Final Office Action acknowledges that Briggs does not teach:

... a toy wand operable by at least one of said one or more play participants by waving, shaking, stroking and/or tapping said toy wand in a predetermined manner to transmit a first signal to wirelessly actuate at least one of said multiple play elements, the toy wand further comprising a memory configured to store identification information for uniquely identifying said at least one play participant of said one or more play participants and (ii) store progress information indicative of a progress of the at least one play participant in the interactive game, the toy wand being further configured to wirelessly transmit at least one of said identification information and said progress information to at least one of said multiple play elements during participation by said at least one play participant in said one or more interactive games or challenges.

Applicant further submits that Briggs does not teach or suggest "at least one of said multiple play elements is further configured to adjust said one or more interactive challenges using at least said progress information," as recited by amended independent Claim 33. Rather, as discussed above, the play elements of Briggs comprise kinetic play elements (e.g., wheels, pulleys, gears, windmills) and are not capable of adjusting interactive challenges based on stored progress information of a play participant.

**Goldsmith**

Goldsmith discloses an input device (10) for transmitting one-way signals for controlling a computer presentation of video signals through the use of a lamp (14) (see, e.g., column 1, lines 38–40). The Final Office Action relies upon Goldsmith for teaching a "wand that wirelessly sends illuminating signals to a device through the use of a transmitter" (page 3).

The Final Office Action further acknowledges that the combination of Briggs and Goldsmith still does not teach a transceiver or:

[a] toy wand comprising a memory configured to store identification information for uniquely identifying said at least one play participant of said one or more play participants, store progress information indicative of a progress of the at least one play participant in the interactive game, the toy wand being further configured to wirelessly transmit said identification information and said progress information to at least one of said multiple

play elements during participation by said at least one play participant in said one or more interactive games or challenges.

Applicant further submits that neither Goldsmith nor the combination of Briggs and Goldsmith teaches or suggests "at least one of said multiple play elements is further configured to adjust said one or more interactive challenges using at least said progress information," as recited by amended independent Claim 33.

**Ackley**

Ackley discloses a system for storing and retrieving data using a device capable of reading both machine-readable symbols and memory devices (see Abstract). For instance, with reference to Figure 5, Ackley discloses a reader (60) having a transceiver (102) configured to read a container having a both bar code symbol (14) and a radio frequency (RF) tag (10) (see col. 5, line 39, through col. 6, line 55).

The Final Office Action appears to rely upon Ackley for teaching the use of a transceiver with an "electronic device so that the device will be able to transmit and receive signals" (page 4 of Final Office Action). From this interpretation of Ackley, the Final Office Action indicates that it would have been obvious to a skilled artisan to replace the disclosed transmitter of Goldsmith with the transceiver of Ackley.

**The Combination of Briggs, Goldsmith and Ackley Still Does Not Disclose Every Limitation of the Claimed System**

Applicant respectfully submits that the combination of Briggs, Goldsmith and Ackley fails to disclose several of the recited limitations of Claim 33, including, but not necessarily limited to:

- 1) A toy wand operable by a play participant by waving, shaking, stroking and/or tapping the toy wand in a predetermined manner to transmit a first signal to wirelessly actuate at least one play element;
- 2) A toy wand comprising a memory configured to store identification information for uniquely identifying the play participant;
- 3) A toy wand comprising a memory configured to store progress information indicative of a progress of the play participant in the interactive game;

- 4) A toy wand configured to wirelessly transmit identification information and progress information to play element(s) during participation by the play participant in the interactive games or challenges; and
- 5) A play element configured to adjust the interactive challenge(s) using at least the progress information.

Even though the Final Office Action acknowledges that the combination of Briggs, Goldsmith and Ackley fails to disclose several of the recited limitations of Claim 33, the Final Office Action continues to allege that Claim 33 is obvious over the cited references.

For example, the Examiner appears to take Official Notice on page 5 of the Final Office Action that it would have been obvious to one having ordinary skill in the art “[t]o store player identification data into [the wand] memory and to transfer this information to” play elements activated by the wand user. The Examiner’s reasoning to support this conclusion is that in “[t]his way, Briggs system can incorporate means to account for each mission completed by the participants.”

As discussed in Applicant’s November 10, 2008 Amendment, Applicant respectfully traverses this conclusion of obviousness as being improper. In particular, as discussed above, Goldsmith is directed to an input device that emits light signals detected by a camera in order to control a computer presentation. There is no teaching, suggestion, or reasoning for using the Goldsmith input device for storing and transmitting player identification information or progress information in an interactive game or for using the Goldsmith input device with a transceiver as disclosed in connection with Ackley’s reader device.

In view of the foregoing, Applicant respectfully requests documentary evidence supporting the Examiner’s assertion that it is well known to include player identification information (and player progress information) in a one-way communication device such as disclosed in Goldsmith (see M.P.E.P. § 2144.03 (stating “[w]hile ‘official notice’ may be relied on, these circumstances should be rare when an application is under final rejection”) (emphasis added)). Absent such documentation, Applicant respectfully

requests the Examiner to withdraw the assertion of Official Notice as support for any subsequent rejection.

**Combination of Briggs, Goldsmith and Ackley Is Not Proper**

Moreover, Applicant respectfully submits that it would not have been obvious to a skilled artisan at the time of Applicant's invention to combine Briggs, Goldsmith and Ackley to teach the interactive gaming system of independent Claim 33. For instance, there appears to be no suggestion or motivation to use the input device of Goldsmith to wirelessly actuate play elements in a kinetic play structure (Briggs) using the bar code/RF tag reading technology of Ackley.

The Final Office Action's reasoning for combining Briggs and Goldsmith appears to be that it would have been obvious "to have implemented a wizardry/fairy type game theme with Briggs play structure where one of the play elements comprises of Goldsmith's wand" (page 4). The Final Office Action emphasizes that this combination could be found in the "references themselves or in the knowledge generally available to one of ordinary skill in the art" (page 8). For example, the Final Office Action states that such motivation to combine Briggs and Goldsmith could be found in column 3, lines 3-5, of Briggs "where it states that other game themes could be implemented" and "would further add to the entertaining factor of Briggs invention" (page 4).

Applicant respectfully submits that the Final Office Action's reasoning for combining Briggs, Goldsmith and Ackley does not meet the legal requirement for supporting a legal conclusion of obviousness. For instance, there is no wizardry/fairy type theme discussed in independent Claim 33, and none of the cited references contemplates such a theme. Moreover, Applicant is unable to see how such reasoning is derived from the knowledge generally available to a skilled artisan.

Rather, Applicant submits that such a combination does not satisfy the standards consistently articulated by the courts for establishing a *prima facie* case of obviousness. For example, the Supreme Court has explained that "a patent composed of several elements is not proved obvious merely by demonstrating that each element was, independently, known in the prior art." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. \_\_\_, \_\_\_, 82 U.S.P.Q.2d 1385, 1396 (2007). Moreover, "[r]ejections on obviousness

grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *Id.* (citing *In re Kahn*, 441 F. 3d 977, 988 (Fed. Cir. 2006) (emphasis added)). Moreover, when prior art references require selective combination to render obvious a subsequent invention, there must be some reason for the combination other than the hindsight obtained from the invention itself. See *Interconnect Planning Corp. v. Feil*, 774 F.2d 1132, 227 U.S.P.Q. 543 (Fed. Cir. 1985); see also M.P.E.P. § 2145(X)(A).

Furthermore, Applicant submits that even if Briggs, Goldsmith and Ackley are combined, they do not teach or suggest every element of independent Claim 33, as discussed above.

#### **Summary**

Because the references cited by the Final Office Action do not disclose, teach or suggest each and every element of amended Claim 33, Applicant asserts that Claim 33 is patentably distinguished over the cited references, and Applicant respectfully requests allowance of Claim 33.

#### **Independent Claims 42, 52 and 59**

Each of independent Claims 42, 52 and 59 is believed to be patentably distinguished over the cited references for reasons similar to those set forth above with respect to the patentability of independent Claim 33 and for the different aspects recited therein. That is, neither Briggs, nor Goldsmith, nor Tillery, nor Ackley, nor any combination thereof, teaches or suggests each and every element of these claims.

For instance, none of the cited references teaches or suggests a motion-operated toy device having a memory that stores identification information and game progress information, which can be wirelessly communicated from the toy device to play element(s) during the performance of an interactive game. Moreover, none of the cited reference teaches or suggests one or more play elements configured to adjust interactive game(s) or challenge(s) using at least progress information wirelessly obtained from the toy device.

Rather, Tillery is directed to a card that records player statistics for a dart game.

Furthermore, Applicant submits that there appears to be no suggestion or motivation to combine the identification card of Tillery with the kinetic play structure of Briggs, the computer input device of Goldsmith and the memory reading device of Ackley. For example, the Final Office Action states that combining Briggs and Goldsmith with Tillery would "facilitate the saving/pausing of a game especially in the common gaming case where the player leaves the game for a bathroom break." However, this stated motivation appears to have no relation to the claimed invention, the cited references or the knowledge of a skilled artisan. Again, mere conclusory statements or personal opinions/knowledge, without an articulated reasoning with some rational underpinning, cannot be used to support a legal conclusion of obviousness.

**Dependent Claims**

Claims 34–40, 67 and 68 depend from independent Claim 33 and are believed to be patentably distinguished over the cited references for the reasons set forth above with respect to Claim 33 and for the additional features recited therein.

Claims 43–45 depend from independent Claim 42 and are believed to be patentably distinguished over the cited references for the reasons set forth above with respect to Claim 42 and for the additional features recited therein.

Claims 53, 54 and 56–58 depend from independent Claim 52 and are believed to be patentably distinguished over the cited references for the reasons set forth above with respect to Claim 52 and for the additional features recited therein.

Claims 60–62, 65, 69 and 70 depend from independent Claim 59 and are believed to be patentably distinguished over the cited references for the reasons set forth above with respect to Claim 59 and for the additional features recited therein.

**Applicant's Traversal of Official Notice with Respect to Claims 68 and 70**

With respect to dependent Claims 68 and 70, the Examiner appears to take Official Notice in combination with four other references that "to add a vibrating type notification signal to the already taught light and sound notification signal is a matter of

design choice well within the skill set of an ordinary skilled artisan" (pages 7 and 8 of Final Office Action).

Applicant respectfully traverses the Examiner's assertion of Official Notice. In particular, as discussed above, none of the cited references teaches a toy wand that receives wireless communication via a transceiver. For instance, the wand-like device of Goldsmith only transmits information (e.g., via a light bulb) to a camera. Thus, none of the cited references teaches or suggests a toy wand that produces vibration or sound upon receiving wireless communication because no cited reference discloses a toy wand that receives communication.

In view of the foregoing, Applicant respectfully disagrees that such elements recited in Claims 68 and 70 can be considered a "design choice" since the cited art would not be capable of performing the claimed features. Thus, Applicant respectfully repeats its request for documentary evidence supporting the Examiner's assertion that it would be a matter of design choice for the Goldsmith input device to produce "at least one of vibration and sound . . . in response to receiving said wireless communications" when the Goldsmith input device is not configured to receive communication.

#### **NO DISCLAIMERS OR DISAVOWALS**

Although the present communication may include alterations to the application or claims, or characterizations of claim scope or referenced art, Applicant is not conceding in this application that previously pending claims are not patentable over the cited references. Rather, any alterations or characterizations are being made to facilitate expeditious prosecution of this application. Applicant reserves the right to pursue at a later date any previously pending or other broader or narrower claims that capture any subject matter supported by the present disclosure, including subject matter found to be specifically disclaimed herein or by any prior prosecution. Accordingly, reviewers of this or any parent, child or related prosecution history shall not reasonably infer that Applicant has made any disclaimers or disavowals of any subject matter supported by the present application.

**SUPPLEMENTAL INFORMATION DISCLOSURE STATEMENT**

Submitted concurrently herewith is a Supplemental Information Disclosure Statement citing ten (10) references. Applicant respectfully requests the Examiner to consider the pending claims in connection with these references in order to make them of record.

**CONCLUSION**

In view of the foregoing, the present application is believed to be in condition for allowance, and such allowance is respectfully requested. If further issues remain, the Examiner is cordially invited to contact the undersigned such that the issues may be promptly resolved.

Moreover, by the foregoing amendments and remarks no admission is made that any of the above-cited references are properly combinable. Rather, Applicant submits that even if the references are combined, the references still do not teach or suggest the claimed invention.

Please charge any additional fees, including any fees for additional extension of time, or credit overpayment to Deposit Account No. 11-1410.

Respectfully submitted,

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